The Use of Search Warrants to Obtain Blood Samples From Juveniles in "Drunk Driving" Cases

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1.1 Introduction

Nationwide, the arrest rate of juveniles for "driving under the influence" has increased within recent years. Juvenile arrest rates for alcohol-related offenses, including "driving under the influence," increased 29% between 1995 and 1996. In 1996, 18,100 juveniles were arrested for "driving under the influence." Snyder, *Juvenile Arrests 1996* (Washington, D.C.: OJJDP, 1997).

In 1997, law enforcement officers nationwide made nearly 19,600 arrests of juveniles below age 18 for "driving under the influence." Snyder, *Juvenile Arrests 1997* (Washington: OJJDP, 1998).

Communities have used a variety of approaches to reversing this trend, from prevention programs to stricter enforcement of existing laws. Under Michigan's "implied consent" statute, drivers of any age suspected of certain "drunk driving" offenses are presumed to have consented to chemical testing of their blood, breath, or urine to determine their blood-alcohol level. If the driver submits to the chemical testing, a "Breathalyzer" test is usually administered. However, if the driver refuses to submit to such testing, the law enforcement officer must obtain a court order before for withdrawal of a blood sample from the driver for chemical testing.

The use of search warrants for the withdrawal of blood samples is one of the tools available to Michigan law enforcement officers and courts to investigate and adjudicate "drunk driving" offenses. Although this procedure is rarely used in cases involving juveniles, either because juveniles submit to "Breathalyzer" tests, or because of a local police or court policy forbidding the practice, there is no legal impediment to the court's issuing a search warrant in an appropriate case. This monograph is intended to clearly set forth the law surrounding search warrant procedures, and to suggest "best practices" when applying the law to juveniles. Sample affidavits and search warrants are provided in Section 1.15.

The procedures explained here apply to "juveniles"—persons under 17 years of age. Under the Juvenile Code, MCL 712A.1 et seq.; MSA 27.3178(598.1) et seq., the Family Division of Circuit Court has exclusive original jurisdiction over persons under 17 years of age who commit criminal offenses. MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1). This includes violations of criminal traffic laws. MCR 5.903(B)(4). When a juvenile is charged with a violation of MCL 257.625; MSA 9.2325, the "drunk driving statute," the delinquency procedures contained in the Juvenile Code and related court rules regarding obtaining custody of and charging the juvenile apply. However, these delinquency procedures may be supplemented by other statutory and constitutional rules of law. This interplay between the delinquency procedures that apply in "drunk driving" cases involving juveniles and the generally applicable law is explained in subsequent sections.

1.2 Investigative Stops

The federal and Michigan constitutions grant all persons the right to be secure against unreasonable searches and seizures. US Const, Am IV, and Const 1963, art 1, §11. The search and seizure protections of the Fourth Amendment to the federal constitution have been extended to juveniles. *New Jersey v TLO*, 469 US 325, 333; 105 S Ct 733; 83 L Ed 2d 720 (1985).

Police may make brief investigative stops of persons short of arrest under certain circumstances. *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). To make a constitutionally valid investigative or "*Terry*" stop, the police officer must have "a particularized suspicion, based on an objective

observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing." *People v Peebles*, 216 Mich App 661, 665 (1996), citing *People v Shabaz*, 424 Mich 42, 59 (1985). The reasonableness of the police officer's suspicion is assessed using a "totality of the circumstances test." *People v Christie (On Remand)*, 206 Mich App 304, 308 (1994), citing *Terry, supra,* and *People v Faucett*, 442 Mich 153, 168 (1993).

In *Christie, supra* at 309, the Court of Appeals stated the general principle that "erratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop by a police officer." See also *Peebles*, *supra*, where the Court of Appeals upheld the investigatory stop of a vehicle traveling without headlights in a parking lot at 3:30 a.m., finding the circumstances sufficient to give rise to a reasonable suspicion of careless driving or theft.

Police are not required to give *Miranda* warnings to persons whose vehicles have been pulled over in an investigative stop. The *Miranda* safeguards apply only after a person is in custody for an offense. *People v Chinn*, 141 Mich App 92, 96 (1985).

1.3 The "Preliminary Breath Test"

When a police officer has reasonable cause to suspect that a person was operating a motor vehicle, and that the person's ability to operate the vehicle may be affected by the consumption of intoxicating liquor, or that a person under 21 years of age is operating a vehicle with any bodily alcohol content, the officer may require the person to submit to a preliminary chemical breath analysis (commonly known as a "preliminary breath test" or "PBT"). MCL 257.625a(2); MSA 9.2325(1)(2). The police officer may "arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis." MCL 257.625a(2)(a); MSA 9.2325(1)(2)(a). A person who refuses to submit to a lawful request by a police officer to take a PBT is responsible for a civil infraction. MCL 257.625a(2)(d); MSA 9.2325(1)(2)(d).

In criminal cases, "reasonable cause" is shown by facts leading a fair-minded person of average intelligence and judgment to believe that an incident has occurred or will occur. *People v Richardson*, 204 Mich App 71, 79 (1994). See also *People v Lyon*, 227 Mich App 599, 611 (1998), citing *Illinois v Gates*, 462 US 213, 243 n 13; 103 S Ct 2317; 76 L Ed 2d 527 (1983) ("probable cause" requires "only a probability or substantial chance of criminal activity, not an actual showing of criminal activity").

1.4 Taking Custody of a Juvenile Without a Court Order for a Suspected Drunk Driving Offense

Several provisions of the Michigan Vehicle Code allow a police officer to make a warrantless arrest of an adult following a suspected violation of drunk driving laws. Juveniles, too, may be taken into custody without a court order in these cases. This section explains how the arrest procedures in the

Michigan Vehicle Code are supplemented by the procedures contained in the Juvenile Code and related court rules.

A. Warrantless Arrest Under the Michigan Vehicle Code

A police officer may arrest a person, including a juvenile, without a warrant following an accident if the officer has reasonable cause to believe that, at the time of the accident, the driver was violating MCL 257.625; MSA 9.2325, or a local ordinance substantially corresponding to this section. MCL 257.625a(1)(a); MSA 9.2325(1)(1)(a). The police officer does not have to witness the violation or accident.

MCL 257.625a(1)(b); MSA 9.2325(1)(1)(b), also provides for warrantless arrest of a person, including a juvenile, even though the officer did not witness the alleged violation. That section allows for warrantless arrest where:

> "The person is found in the driver's seat of a vehicle parked or stopped on a highway or street within this state if any part of the vehicle intrudes into the roadway and the peace officer has reasonable cause to believe the person was operating the vehicle in violation of section 625 or a local ordinance substantially corresponding to section 625."

In addition, MCL 257.727; MSA 9.2327, allows for persons, including juveniles, to be arrested without a warrant and taken before a court for the following offenses:

- negligent homicide, MCL 750.324; MSA 28.556;
- driving under the influence of alcoholic liquor and/or a controlled substance, MCL 257.625(1)(a); MSA 9.2325(1)(a), or a local ordinance substantially corresponding to this section;
- driving with an unlawful bodily alcohol content, MCL 257.625(1)(b); MSA 9.2325(1)(b), or a local ordinance substantially corresponding to this section;
- driving while visibly impaired, MCL 257.625(3); MSA 9.2325(3), or a local ordinance substantially corresponding to this section;
- driving under the influence of alcoholic liquor and/or a controlled substance, or while visibly impaired, causing death, MCL 257.625(4); MSA 9.2325(4); or
- driving under the influence of alcoholic liquor and/or a controlled substance, or while visibly impaired, causing serious impairment of a body function, MCL 257.625(5); MSA 9.2325(5);
- reckless driving, in violation of MCL 257.626; MSA 9.2326, unless it appears that release of the driver will not constitute a public menace; or
- failure to have immediate possession of a valid operator's license, chauffeur's license, or a receipt for a surrendered license issued pursuant to MCL 257.311a; MSA 9.2011(1), unless "the arresting officer otherwise

satisfactorily determines the identity of the person and the practicability of subsequent apprehension" if the person fails to appear.

B. Under the Juvenile Code

The Juvenile Code provides a broader basis than the Vehicle Code on which to take custody of a juvenile charged with committing a criminal traffic offense. MCL 712A.14(1); MSA 27.3178(598.14)(1), allows a police officer, sheriff, or deputy sheriff, without a court order, to take into custody any juvenile who is found violating *any law or ordinance, or whose surroundings are such as to endanger the juvenile's health, morals, or welfare.* After apprehending the juvenile, the officer must immediately attempt to notify the juvenile's parent, guardian, or custodian.

When a person under the age of 17 is taken into custody, the person must be taken "immediately" before the Family Division of Circuit Court, and the arresting officer must file or request the prosecuting attorney to file a petition. MCL 764.27; MSA 28.886. See also MCR 5.933(A)(3) (officer may retain custody of a juvenile if release would not protect the interests of the juvenile or public given the nature of the offense) and MCR 5.934(A)(1) (officer must "forthwith take the juvenile before the court for a preliminary hearing, or to a place designated by the court pending the scheduling of a preliminary hearing").

Michigan courts have held that it does not violate MCL 764.27; MSA 28.886, to "bring a youth to police headquarters for investigation," *People v Roberts,* 3 Mich App 605, 613 (1966), or to complete booking procedures, type a delinquency petition, or, as required by statute, fingerprint the juvenile. *People v Hammond,* 27 Mich App 490, 493–94 (1970), *People v Coleman*, 19 Mich App 250, 253–54 (1969), and *People v Morris,* 57 Mich App 573, 575–76 (1975).

Thus, it appears that MCL 764.27; MSA 28.886, is not violated when the police bring a juvenile to the stationhouse for a "Breathalyzer" test because they are investigating an alleged offense rather than formally accusing the juvenile by filing or causing to be filed a petition. However, the delay, if any, in bringing the juvenile before the court must not be used to extract a statement concerning an alleged offense from the juvenile. *People v Strunk,* 184 Mich App 310, 314–22 (1990).

1.5 Juvenile's Right to Counsel

Before subjecting any person suspected of a crime to custodial interrogation, police officers must advise the accused of the right to remain silent, that any statement he makes may be used as evidence against him, that he may have retained or appointed counsel present during questioning, and that he may stop answering questions at any time. *Miranda v Arizona,* 384 US 436, 478–79; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The procedural protections of *Miranda* have been applied to juvenile proceedings. *Fare v Michael C,* 442 US 707, 717, n 4; 99 S Ct 2560; 61 L Ed 2d 197 (1979) (assuming without

deciding that *Miranda* applies to juvenile proceedings). The "*Miranda* Rule" protects the Fifth Amendment privilege against compulsory self-incrimination, which is applicable in juvenile delinquency proceedings. See *In re Gault*, 387 US 1, 55; 87 S Ct 1428; 18 L Ed 2d 527 (1966), and MCR 5.935(B)(4)(c). However, compulsory withdrawal of a blood sample from a person suspected of drunk driving does not trigger the Fifth Amendment privilege against self-incrimination because the evidence is not testimonial in nature. *Schmerber v California*, 384 US 757, 760–66; 86 S Ct 1826; 16 L Ed 2d 908 (1966).

The Fifth Amendment right to counsel attaches only when the accused is subjected to "custodial interrogation." *People v Bladel (After Remand)*, 421 Mich 39, 51 (1984), aff'd *Michigan v Jackson*, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). For a discussion of the concept of "custody," see *Berkemer v McCarty*, 468 US 420, 434; 104 S Ct 3138; 82 L Ed 2d 317 (1983) (a driver's statements to a police officer made prior to the driver's arrest for drunk driving were admissible into evidence despite the officer's failure to read the *Miranda* warnings to the driver) and *People v Williams*, 163 Mich App 744, 753 (1987) (a juvenile murder suspect was "in custody" from the time he entered the police car).

The concept of "interrogation" was discussed in *Pennsylvania v Muniz*, 496 US 582, 603–605 (1990), where a drunk driving suspect was arrested and taken to a booking center without being advised of his *Miranda* rights. At the booking center, the suspect made several incriminating statements while refusing to submit to a "Breathalyzer" examination and while performing physical sobriety tests. A majority of the U.S. Supreme Court held that the statements were admissible at trial because they were made voluntarily and not elicited in response to interrogation. The majority found that the officers who communicated with the suspect in this context limited their remarks to providing instructions regarding the tests at issue; the officers' remarks did not call for verbal responses from the suspect except as to whether he understood the instructions.

A plurality of the U.S. Supreme Court in *Muniz* held that the *Miranda* protections do not attach to routine booking questions asked for record-keeping purposes, which are reasonably related to police administrative concerns. Such questions may be asked to secure the biographical data necessary to complete booking or pretrial services, and include a suspect's name, address, height, weight, eye color, date of birth, or age. *Pennsylvania v Muniz, supra*, 496 US at 601–602.

A juvenile in a delinquency case has a Sixth Amendment constitutional right to the assistance of counsel at each stage of formal proceedings. See, generally, *In re Gault*, 387 US 1, 42; 87 S Ct 1428; 18 L Ed 2d 527 (1967) and MCL 712A.17c(1); MSA 27.3178(598.17c)(1). MCR 5.915(A)(1) and 5.935(B)(4) provide for the appointment of counsel when a case is placed on the "formal calendar," which usually occurs after a preliminary hearing is conducted.

An adult has no Sixth Amendment constitutional right to counsel when deciding whether to submit to a "Breathalyzer" test in cases where the "implied consent" statute applies. For a detailed discussion, see Section 1.7.

1.6 The "Implied Consent" Statute and Its Applicability to Juveniles

MCL 257.625c; MSA 9.2325(3), commonly referred to as the "implied consent" statute, provides:

> "A person who operates a vehicle upon a public highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol or presence of a controlled substance or both in his or her blood or urine or the amount of alcohol in his or her breath in all of the following circumstances:
>
> "(a) If the person is arrested for a violation of section 625(1), (3), (4), (5), (6), or (7), . . . or a local ordinance substantially corresponding to section 625(1), (3), or (6). . . .
>
> "(b) If the person is arrested for felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, and the peace officer had reasonable grounds to believe the person was operating the vehicle while impaired by or under the influence of intoxicating liquor or a controlled substance or a combination of intoxicating liquor and a controlled substance, or . . . if the person is less than 21 years of age while having any bodily alcohol content."

In OAG, 1985, No 6321, p 168 (November 8, 1985), the Attorney General addressed two issues relating to the "implied consent" statute:

- Whether a juvenile suspected of drunk driving has the ability to consent to a "Breathalyzer" test or a blood test.
- Whether a police officer who stops and/or arrests a juvenile for a suspected drunk driving offense is obligated to notify the minor's parents and to obtain their consent before the minor can take a breath or blood test.

In answering the first of these questions in the affirmative, the Attorney General provided three reasons:

- The Michigan Vehicle Code defines the term "person" to include "every natural person," which clearly includes juveniles, MCL 257.40; MSA 9.1840.
- The "implied consent" statute itself enumerates those persons to whom it does not apply; thus, the Legislature intended the statute to apply to all other persons not enumerated.

- Since "implied consent" provisions have been held to allow the performance of chemical tests on people who are unconscious or otherwise incapable of actually consenting to such tests, Michigan's "implied consent" statute should apply to juveniles.

Because minors are deemed to have consented to chemical tests under the "implied consent" statute, the police are not required to obtain a parent's consent prior to administering a chemical test. However, the Advisory Committee for this monograph suggests that efforts be made to contact the juvenile's parent or guardian as a "best practice." See Section 1.7(C).

Note: The opinions of the attorney general "are binding on state agencies for limited purposes only until the courts make a pronouncement on the issue." *People v Waterman,* 137 Mich App 429, 439 (1984). No Michigan appellate court has addressed the applicability of the "implied consent" statute to juveniles. Therefore, the attorney general's opinion explained above does not bind trial courts of this state.

1.7 "Best Practice": Presence of Attorney or Parent Prior to Juvenile's Consent to "Breathalyzer" Test

An adult has no Sixth Amendment constitutional right to counsel when deciding whether to submit to a "Breathalyzer" test in cases where the "implied consent" statute applies. *Ann Arbor v McCleary,* 228 Mich App 674, 678 (1998) (the Sixth Amendment does not provide the accused with a right to counsel in deciding whether to submit to a "Breathalyzer" test). See also *United States v Wade,* 388 US 218, 227–28; 87 S Ct 1926; 18 L Ed 2d 1149 (1967) ("evidence-gathering" stage is not "critical stage" of a criminal proceeding triggering Sixth Amendment right to counsel). However, an adult drunk-driving suspect should be given a reasonable opportunity to telephone an attorney before making this decision, as a "commendable police practice." *Hall v Secretary of State,* 60 Mich App 431, 441 (1975). See also *Holmberg v 54–A District Judge,* 60 Mich App 757, 760 (1975).

Even where the police department in question has a policy to allow the suspect to contact an attorney, it is unlikely that most juveniles will be able to avail themselves of it without parental assistance. Moreover, the juvenile may wish to speak to his or her parent instead of an attorney. No Michigan case has decided whether a juvenile has a right or should be allowed to consult with a parent when deciding whether to submit to a "Breathalyzer" test. Several cases from other states have addressed the issue, however.

A. Case Law From Other States

- In *Stefano v Comm'r of Public Safety,* 358 NW 2d 83 (Minn App 1984), the arresting officer refused the request of a 17-year-old to speak to his father, who was at the station, before submitting to a chemical test. The minor appealed the revocation of his driver's license, claiming that his refusal to submit to the test was reasonable. At the time of the offense, adults in Minnesota had a limited statutory right to consult with an

attorney prior to taking a chemical test. The minor argued that the only meaningful way for a juvenile to exercise a similar right would be to allow the juvenile to consult with his or her parent. The Court disagreed, concluding that the state's "implied consent" statute, which made no distinction by age, should be applied to minors in the same way that it was applied to adults. *Id.,* at 84–85.

F In *In re Kean*, 520 A2d 1271 (RI 1987), the Supreme Court of Rhode Island concluded that the presence of a parent was one factor to consider in determining the validity of a juvenile's waiver of a statutory right to refuse to consent to a "Breathalyzer" test.* The 17-1/2 year-old juvenile, who had previously been arrested for a drunk-driving offense, refused to call either his parents or an attorney prior to administration of the test. The arresting officer spoke to the juvenile's father on the telephone, but the father was not present when the juvenile signed a consent form for the "Breathalyzer" test. *Id.,* at 1272–73. After noting that adults have no constitutional right to counsel at the "Breathalyzer stage" of a proceeding, the Court held that a totality-of-the-circumstances test should be applied in evaluating the admissibility of test results obtained in these circumstances. *Id.,* at 1276.

*See Section 1.8(A), below, for a list of the statutory rights required to be read to persons under Michigan's "implied consent" statute.

F In *Olson v Dep't of Transportation*, 523 NW 2d 258, 259 (ND 1994), the Supreme Court of North Dakota held that "a minor taken into custody for drunk driving has a qualified statutory right to have his or her parent contacted, if reasonable under the circumstances, and read the "implied consent" advisory, prior to administration of a chemical test." After taking a 17-year-old into custody for drunk driving, police officers unsuccessfully attempted to contact his parents by telephoning and going to their residence. Just prior to taking a blood sample from the minor, an officer spoke to the minor's mother but did not advise her of the minor's rights under the state's "implied consent" law. The minor refused to submit to the blood test but, after consulting by phone with an attorney, agreed to submit to a urine test. That test was refused because only two or three minutes remained in the permissible two-hour testing period. *Id.* In reversing the decision to revoke the minor's license, the North Dakota Supreme Court construed the following statutory language:

> "When a child is taken into custody for violating [a drunk driving law], the law enforcement officer shall diligently attempt to contact the child's parent or legal guardian to explain the cause for the custody and the "implied consent" chemical testing requirements. Neither the law enforcement officer's efforts to contact, nor any consultation with, a parent or legal guardian may be permitted to interfere with the administration of chemical testing requirements under this chapter." *Id.,* at 260.*

*The statute in question in this case, N.D. Cent. Code §39-20-01 (1999), has subsequently been amended to eliminate the requirement that the parent be advised of rights under the state's "implied consent" law.

The Court concluded that the statute showed a clear legislative intent that the parent be involved in the child's decision to take or refuse a chemical test. Thus, the parent must be advised of the child's rights under the "implied consent" law in order to participate meaningfully in the child's decision. *Id.*

*See Section 1.7(B), below, for a discussion of these provisions.

F In *Delaware v Andrew J DiM*, 1986 Del. Fam. Ct. Lexis 211 (1986), a trial court refused to suppress results of a chemical breath test performed on a minor, where the minor's parents were not contacted until after the test was completed. At the time of the case, Delaware had in place a statute and court rule, similar to those currently in place in Michigan,* that required a police officer who takes a minor into custody to immediately notify or attempt to notify the minor's parents. The court noted that the delay in contacting the minor's parents was only one hour and examined the validity of the minor's consent using a totality-of-the-circumstances analysis.

B. Michigan Law

By statute, a police officer who takes a juvenile into custody is required to immediately attempt to notify the parent or guardian of the juvenile. MCL 712A.14(1); MSA 27.3178(598.14)(1). In other instances in delinquency proceedings, the applicable statutes and court rules provide for the presence of a parent or guardian. See, for example, MCR 5.920(C)(1) (parent must be notified of preliminary hearing), MCR 5.920(A)(2)(a) (parent must be summoned for trial), and MCR 5.932(B) (parent and juvenile may consent to court jurisdiction). A juvenile may not waive the right to assistance of counsel in juvenile proceedings over objection of a parent. MCR 5.915(A)(3).

Michigan courts examine the totality of the circumstances, including the presence of an adult parent, guardian, or custodian, to determine the voluntariness of a juvenile's confession, *People v Good*, 186 Mich App 180, 186–90 (1990), and the validity of a juvenile's waiver of his or her *Miranda* rights, *In the Matter of Abraham*, 234 Mich App 640, 643–55 (1999).

*See Section 1.8(A), below, for a description of these requirements.

Under Michigan's "implied consent" statute, persons charged with certain offenses must be advised of rights and procedures under the statute, including the provision for the officer to obtain a court order to withdraw a test sample if the person refuses to consent to the test. In addition, persons must be advised of applicable police regulations regarding administration of the tests.*

C. "Best Practice" Recommendations

The language of Michigan's "implied consent" statute does not indicate an intent by the Legislature that police officers treat persons under 17 years of age differently than adults when asking them to submit to chemical tests. However, statutes and court rules governing cases involving juveniles provide for different treatment of juveniles. In particular, the presence and participation of a parent is requested at several key points in delinquency proceedings. The Advisory Committee for this monograph suggests that these two strands of law should be harmonized when deciding what to do prior to asking the juvenile to submit to a chemical test under the "implied consent" statute. The following are submitted as "best practice" guidelines for officers who take a juvenile into custody for a drunk driving offense:

- After taking the juvenile into custody, immediately attempt to notify the juvenile's parent or guardian by telephone.
- If you speak with the juvenile's parent or guardian, notify them of the juvenile's location, the reason for the juvenile's custody, and the juvenile's rights and procedures under the "implied consent" statute. Also, tell the parent or guardian about any departmental procedures governing chemical testing (e.g., any time requirements for administering a "Breathalyzer" test).
- Allow the juvenile the opportunity to consult with the parent or guardian, either by telephone, in person (if the parent arrives within a reasonable time given the time requirements for administration of the test), or both.
- If you are unsuccessful in contacting the juvenile's parent or guardian after a reasonable time given the time requirements for administration of the test, or if the parent or guardian refuses to consult with the juvenile, follow the normal procedures for cases involving adults.
- If the juvenile asks for the opportunity to consult with an attorney, allow the juvenile to do so within the departmental rules applicable to adults in such circumstances.

1.8 Statutory Procedures for Administering Chemical Tests Under the "Implied Consent" Statute

The initial choice of the type of test (breath, urine, or blood) that will be offered to the person is made by the arresting officer. *Collins v Secretary of State*, 384 Mich 656, 667 (1971).

A. Required Advice of Rights

Under MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b), a person arrested for an offense described in the "implied consent" statute must be advised of all of the following:

- if he or she takes a chemical test of his or her blood, urine, or breath administered at the request of a peace officer, he or she has the right to demand that a person of his or her own choosing also administer one of the chemical tests;
- the results of the test are admissible in a judicial proceeding as provided under the Michigan Vehicle Code and will be considered with other admissible evidence in determining the defendant's guilt or innocence;
- he or she is responsible for obtaining a chemical analysis of a test sample obtained pursuant to his or her own request;
- if he or she refuses the request of a peace officer to take a chemical test, a test shall not be given without a court order, but the peace officer may seek to obtain a court order; and
- refusing a peace officer's request to take a chemical test will result in suspension of his or her operator's or chauffeur's license and vehicle

group designation or operating privilege and in the addition of 6 points to his or her driving record.

In addition to the statutory notices that must be given under §625a(6)(b), persons arrested for drunk driving must be informed of any police administrative rules that materially affect their decisions regarding chemical tests. In *People v Castle,* 108 Mich App 353 (1981), police arrested the defendant for OUIL, advised him of his rights under the "implied consent" statute, and asked him to take a "Breathalyzer" test. The defendant refused to take the test without first consulting his attorney. An hour and ten minutes later, the attorney arrived and asked that defendant be given the "Breathalyzer" test. The police refused to administer the test, citing a departmental policy not to give a test if more than one hour had elapsed since the request for it. Because the defendant had not been informed of this policy, he moved to dismiss the charges against him. The Court of Appeals held that the charges should be dismissed, stating that ". . . any person charged with [OUIL] must be informed of police regulations and rules, if any, that materially affect him to insure that the accused has an opportunity to make an informed decision." *Id.,* at 357.

The Department of State Police has promulgated uniform rules for the administration of chemical tests under §625a(6). These can be found at 1994 AACS, R 325.2651 et seq. and 1993 AACS, R 325.2671 et seq.

B. Methods for Collecting the Sample

A chemical test must be administered at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in §625c(1). MCL 257.625a(6)(d); MSA 9.2325(1)(6)(d). A sample of urine or breath may be taken and collected in a reasonable manner, but a sample of blood must be withdrawn only by a licensed physician or a person operating under the delegation of a licensed physician pursuant to MCL 333.16215; MSA 14.15(16215). MCL 257.625a(6)(c); MSA 9.2325(1)(6)(c).

Parental consent to the withdrawal of a blood sample is recommended but its absence does not affect the validity of a minor's consent to the procedure. In most circumstances, parents must consent to non-emergency medical procedures performed on their minor children. *Zoskie v Gaines,* 271 Mich 1, 10 (1935). However, emancipation occurs by operation of law "for the purpose of consenting to routine, nonsurgical medical care or emergency medical treatment of a minor, where the minor is in the custody of a law enforcement agency and the minor's parent or guardian cannot be promptly located." MCL 722.4(2)(d); MSA 25.244(4)(2)(d).

The test results are admissible and will be considered with other admissible evidence in determining the defendant's guilt or innocence. MCL 257.625a(6)(d); MSA 9.2325(1)(6)(d).

A person who submits to a chemical test at an officer's request must be given a reasonable opportunity to have a person of his or her own choosing administer one of the chemical tests within a reasonable time after his or her detention. MCL 257.625a(6)(d); MSA 9.2325(1)(6)(d). Because a juvenile is unlikely to be able to avail himself or herself of this statutory right without guidance from an adult, it is recommended that a parent or guardian be notified of the rights and procedures listed in MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b). Ideally, the parent or guardian would be present prior to the administration of the test.*

*See Section 1.8(A), above, for the required advice of rights and procedures under the "implied consent" law. For a more complete discussion of the notification and/or presence of a parent or guardian at this stage of the proceeding, see Section 1.7, above.

C. Destruction of License or Permit

Upon obtaining the results of the chemical analysis of a driver's blood, breath, or urine, the officer must comply with MCL 257.625g; MSA 9.2325(7) (notification of Secretary of State, destruction of license or permit, and issuance of temporary license or permit).

1.9 Use of Search Warrants to Obtain Samples

In *Schmerber v California*, 384 US 757, 771; 86 S Ct 1826; 16 L Ed 2d 908 (1966), the United States Supreme Court held that warrantless searches to obtain blood samples for chemical testing may be constitutional in "emergency" situations. *Schmerber* involved a defendant injured in an automobile accident who was taken by the police officer to the hospital, where a blood sample was drawn over the defendant's objection. The Court stressed, however, the applicability of the warrant requirement in non-emergency situations:

> "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' . . . The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Id.*, at 770 (citations omitted).

The Court also concluded that the taking of a blood sample for blood-alcohol testing is "reasonable" under the Fourth Amendment if such procedures are conducted in a hospital by medical personnel. *Id.*, at 771–72. The Court stated the following concerning the nature of "blood draws":

> "Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. See

> *Breithaupt v Abram, 352 U.S., at 436, n. 3.* Such tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Id.*, at 771 (footnote omitted).

The United States Supreme Court has also concluded that "blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Winston v Lee*, 470 US 753, 762; 105 S Ct 1611; 84 L Ed 2d 662 (1985). See also MCL 712A.18k(1); MSA 27.3178(598.18k)(1) (court must order juvenile found responsible for certain offenses to submit sample for DNA testing), MCL 333.5129; MSA 14.15(5129) (juveniles may be required to submit samples for AIDS testing), and MCR 5.936(B)(2) (court may issue an order directing law enforcement officer to apprehend juvenile for purpose of taking fingerprints).

Usually, when a person refuses to submit to a chemical test under the "implied consent" statute, the police officer requests a search warrant to conduct a blood test. MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b), and MCL 257.625d(1); MSA 9.2325(4)(1). When a blood sample is taken pursuant to a search warrant, the "implied consent" statute does not apply. *Manko v Root*, 190 Mich App 702 (1991). The results of a preliminary chemical breath analysis may be used to establish the requisite probable cause for a search warrant to obtain a blood or urine sample for a chemical test. *People v Tracy*, 186 Mich App 171 (1990).

If the person refuses to submit to a chemical test, the officer must obtain a court order prior to the administration of the test. MCL 257.625d(1); MSA 9.2325(4)(1). The court order may be a search warrant. MCL 780.651(3); MSA 28.1259(1)(3).

A few states expressly provide that if a "minor" or "juvenile" refuses to consent to a chemical test, no test shall be given. In Rhode Island, if a person under 18 years of age refuses to consent to any type of blood-alcohol test, no test may be administered, though the juvenile's license is suspended. R.I. Gen. Laws §31-27-2.5 (1999). Alaska's statute is similar. Alaska Stat. §28.35.285 (1999).

1.10 Authority to Issue Search Warrants for Withdrawal of a Blood Sample

The Attorney General has concluded that the "implied consent" statute applies to juveniles. OAG, 1985, No 6321, p 168 (November 8, 1985).* If a juvenile refuses to submit to a chemical test under the "implied consent" statute, the arresting officer may seek a search warrant to obtain a blood sample from the juvenile. MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b), and MCL 257.625d(1); MSA 9.2325(4)(1).

*See Section 1.6, above, for a discussion of this opinion.

A. Circuit Court Judges

There is general authority for circuit court judges to issue search warrants. MCL 780.651(2)(a) and (3); MSA 28.1259(1)(2)(a) and (3), specify that judges may issue search warrants. MCL 780.651; MSA 28.1259(1), also authorizes "magistrates" to issue search warrants. MCL 761.1(f); MSA 28.843(f), defines "magistrate" as a district court or municipal court judge, and goes on to state the following:

> "This definition does not limit the power of a justice of the supreme court, *a circuit judge*, or a judge of a court of record having jurisdiction of criminal cases under this act, *or deprive him or her of the power to exercise the authority of a magistrate."* (Emphasis added.)

Because circuit court judges have authority to issue search warrants, there is no obstacle to a judge of the Family Division of Circuit Court issuing a search warrant to obtain a sample of blood from a juvenile pursuant to §625a of the Michigan Vehicle Code.

Note: As noted above, the Michigan Vehicle Code and the Code of Criminal Procedure give circuit court judges, including Family Division judges, the authority to issue search warrants to obtain blood samples from juveniles charged with "drunk driving" offenses. Michigan's Juvenile Code and related court rules may give a Family Division judge the authority to issue a search warrant after a petition has been filed. MCL 712A.12; MSA 27.3178(598.12), states that "[a]fter a petition shall have been filed and after such further investigation as the court may direct, in the course of which the court may order the child to be examined by a physician . . . ," the court may dismiss the petition or issue a summons to the persons who have custody or control of the child. See also MCR 5.923(B), which allows the court to order an evaluation or examination of a child. It is unclear whether these provisions allow the court to order an examination upon the filing of but prior to authorization of the petition, and whether the withdrawal of a blood sample could be defined as an "examination."

A few states have statutes or court rules that explicitly grant a "juvenile court judge" the authority to issue search warrants. See Colo Rev Stat §19-2-504 (1998), Ga Code Ann §15-11-65 (1999), and Missouri Rule of Court 124.01 (1999).

B. District Court Magistrates

In addition, district court magistrates, when authorized to do so by a district court judge, have authority to issue search warrants. MCL 600.8511(d); MSA 27A.8511(d). However, it is unclear whether a district court magistrate, if authorized to issue search warrants by the district court judge, may issue a search warrant to obtain a blood sample from a juvenile. In *People v Fiorillo*, 195 Mich App 701, 704 (1992), the Court of Appeals held that a magistrate

could issue a search warrant that was to be executed outside of the district in which the magistrate served. The Court in *Fiorillo* only dealt with territorial limitations on the execution of search warrants. No reported Michigan case deals with the question of whether an authorized magistrate may issue a search warrant in a case in which the district court has no jurisdiction.

C. Circuit Court Referees

Circuit court referees have no authority to issue search warrants. See MCL 780.651; MSA 28.1259(1), MCL 761.1(f); MSA 28.843(f), MCL 712A.10(1); MSA 27.3178(598.10)(1), and MCR 5.913.

1.11 General Rules Governing Issuance of Search Warrants

A. Establishing Probable Cause

MCL 780.653; MSA 28.1259(3), requires that a magistrate's reasonable or probable cause finding in issuing a search warrant "shall be based upon all the facts related within the affidavit made before him or her." The results of a preliminary chemical breath analysis may be used to establish the requisite probable cause for a search warrant to obtain a blood or urine sample for a chemical test. *People v Tracy*, 186 Mich App 171 (1990).

Oral testimony may not be used to supplement the information contained in the affidavit. In *People v Sloan*, 450 Mich 160 (1995), the Michigan Supreme Court considered a case where a search warrant was issued for a blood test of a defendant charged with OUIL causing death. The affidavit submitted in support of the warrant contained mere conclusions; however, the magistrate issued the warrant after hearing the affiant officer's sworn oral testimony as to the defendant's physical condition at the scene of the accident giving rise to the charges. The trial court denied the defendant's motion to suppress the test results obtained under the warrant, and the defendant appealed. A majority of the Supreme Court held that the test results should have been suppressed because the search warrant was invalid. In response to the prosecutor's argument that probable cause to issue the warrant existed when the conclusions in the affidavit were considered together with the affiant's oral testimony, the Court held:

> "[W]hen reviewing courts assess a magistrate's probable cause determination, they may *not* consider sworn, yet unrecorded oral testimony that, contemporaneous with an affidavit, is offered to the magistrate to show probable cause. Our primary reason for so holding is our belief that requiring reviewing courts to consider sworn, yet unrecorded, oral testimony would impose a significant and unnecessary burden on their ability to reliably assess whether the constitutional requirement for probable cause had been satisfied." 450 Mich at 173. [Emphasis in original.]

B. Issuance Procedures

Usually, a police officer rather than a prosecutor drafts the affidavit in support of a request for a search warrant to obtain a blood test. Therefore, the affidavit and warrant should be carefully reviewed. The following are the recommended steps:*

*The listed steps are based on Const 1963, Art 1, §11, MCL 257.625a(6); MSA 9.2325(1)(6), MCL 780.651; MSA 28.1259(1), and MCL 780.653 - 780.655; MSA 28.1259(3) – (5).

1. Determine whether the time of day that defendant was driving is mentioned in the affidavit.

2. Determine that the person to be searched is described with particularity.

3. Determine that the sample to be seized is described with particularity.

4. Determine that the requested sample will be drawn by a licensed physician or a person working under the delegation of a licensed physician who is qualified to withdraw blood and acting in a medical environment.

5. Determine whether the affidavit establishes reasonable grounds to believe that the person has committed one of the following offenses:

- **F** OUIL/OUID/UBAC under Vehicle Code §625(1).
- **F** OWI under Vehicle Code §625(3).
- **F** OUIL/OUID/UBAC OWI causing death or serious impairment of a body function under §625(4) or (5) of the Vehicle Code.
- **F** A zero tolerance violation under §625(6) of the Vehicle Code.
- **F** Child endangerment under §625(7) of the Vehicle Code.
- **F** Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5) of the Vehicle Code.
- **F** Operating a commercial motor vehicle with an unlawful bodily alcohol content under Vehicle Code §625m.
- **F** Violation of a local ordinance substantially corresponding to Vehicle Code §625(1), (3), or (6), §625a(5), or §625m.
- **F** Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the police had reasonable grounds to believe the driver was operating the vehicle: a) while impaired by or under the influence of alcohol and/or a controlled substance; b) with an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine; or, c) in violation of the zero tolerance provisions of §625(6).

6. If the affidavit is based on information supplied to affiant by a named person, such as another police officer, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information.

7. If the affidavit is based on information supplied to affiant by an unnamed person, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that:

- **F** The unnamed person spoke with personal knowledge; and,
- **F** The unnamed person is credible, or that the information is reliable.

8. Place the affiant under oath, and ask if the averments in the affidavit are true to the best of the affiant's information and belief.

9. Have the affiant sign the affidavit. See *People v Mitchell*, 428 Mich 364, 369 (1987), holding that a search warrant based upon an unsigned affidavit is presumed invalid; however, the prosecutor may rebut the presumption by a showing that the affidavit was made on oath to a magistrate.

10. Sign and date the affidavit and all copies of the search warrant. See *People v Barkley*, 225 Mich App 539, 545 (1997), holding that the lack of a judge's or magistrate's signature on a search warrant raises a presumption that the warrant is invalid. This presumption may be rebutted with evidence that the magistrate or judge in fact determined that the search was warranted and intended to issue the warrant before the search.

11. Retain the original affidavit and the appropriate copy of the warrant.

12. Direct the officer in charge to leave a completed copy of the search warrant with the person searched.

13. Ensure that a completed tabulation is promptly filed with the court after execution of the search.

C. Issuance of Search Warrants by Electronic or Electromagnetic Devices

Under MCL 780.651(2); MSA 28.1259(1)(2), an affidavit for a search warrant may be made by any electronic or electromagnetic means of communication if both of the following occur:

- **F** The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits the affidavit; and,
- **F** The affiant signs the affidavit. Proof that the affiant signed the affidavit may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit.

Under MCL 780.651(3); MSA 28.1259(1)(3), a written search warrant for a blood test under Vehicle Code §625a may be issued in person or by any electronic or electromagnetic means of communication by a judge or by a district court magistrate. The officer receiving an electronically or electromagnetically issued search warrant must receive proof of the issuing

judge's or magistrate's signature before executing the warrant. Proof of this signature may consist of an electronically or electromagnetically transmitted facsimile of the signed warrant. MCL 780.651(4); MSA 28.1259(1)(4).

If an oath or affirmation is orally administered by electronic or electromagnetic means of communication, the oath or affirmation is considered to be administered before the judge or district court magistrate. MCL 780.651(6); MSA 28.1259(1)(6). See also Administrative Order 1990–9.

If an affidavit for a search warrant or the warrant itself is submitted by electronic or electromagnetic means of communication, the transmitted copies of the affidavit or warrant are duplicate originals, and are not required to contain an impression made by an impression seal. MCL 780.651(7); MSA 28.1259(1)(7).

Administrative Order 1990–9 addresses voice and facsimile communication equipment for the transmission and filing of court documents. Pursuant to this Order, a court may promulgate local rules governing the filing of facsimile documents.

1.12 Exceptions to the Search Warrant Requirement

A. Blood Tests Taken for Medical Treatment After an Accident

Search warrant requirements do not apply to blood tests taken for medical treatment after an accident. MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) provides that if a driver is transported to a medical facility and a blood sample is withdrawn for medical treatment, the results of a chemical analysis are admissible in any civil or criminal proceeding to show the amount of alcohol and/or presence of a controlled substance in the person's blood at the time of the accident, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecutor who requests them for use in a criminal prosecution. The Michigan Supreme Court has held that MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) renders the results of blood tests admissible at trial irrespective of whether the physician-patient privilege was waived or a valid search warrant was obtained. *People v Keskimaki*, 446 Mich 240, 247 (1994).

See also *People v Perlos*, 436 Mich 305 (1990), in which the Supreme Court upheld the constitutionality of former MCL 257.625a(9); MSA 9.2325(1)(9), now MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e), finding that: 1) blood withdrawn for medical treatment does not implicate the Fourth Amendment because there is no state involvement in the withdrawal, 436 Mich at 315–316; and, 2) the state's warrantless acquisition of such tests does not violate the Fourth Amendment because intoxicated drivers involved in accidents have no reasonable expectation of privacy in blood alcohol test results, 436 Mich at 330.

> **Note:** If a driver is deceased after an accident, a blood sample shall be withdrawn in a manner directed by the medical examiner to determine the amount of alcohol and/or presence of a controlled substance. The medical examiner shall give the results of the chemical analysis to the law enforcement agency investigating the accident; that agency shall forward the results to the Department of State Police. MCL 257.625a(6)(f); MSA 9.2325(1)(6)(f).

In *People v Keskimaki*, *supra*, the Supreme Court considered the meaning of the word "accident" in the context of former MCL 257.625a(9); MSA 9.2325(1)(9), now MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e). The defendant in *Keskimaki* was observed in his vehicle, which was lawfully parked on the shoulder of the road. Defendant was slumped over the steering wheel, apparently unconscious and breathing erratically. When officers failed to rouse the defendant, he was taken to the hospital, where his blood alcohol content proved to be greater than 0.10. In response to charges of OUIL, the defendant moved to suppress evidence of his blood test results, which had been offered into evidence under the accident exception to the "implied consent" statute. The trial court denied the defendant's motion to suppress, and the defendant appealed. The Supreme Court held that the test results should have been suppressed because no "accident" had occurred. In so holding, the Court declined to propound a general definition of "accident" for purposes of the statute. Instead, it set forth the following "relevant factors" for determining whether an "accident" has occurred:

> "[W]e believe consideration should be given to whether there has been a collision, whether personal injury or property damage has resulted from the occurrence, and whether the incident either was undesirable for or unexpected by any of the parties directly involved. While we do not intend this to be an exhaustive list of factors to be considered, included are those that we believe will appear with frequency in true 'accidents'. . . ." 446 Mich at 255–256.

Applying the foregoing factors, the Court concluded that the defendant had not been involved in an accident based on the fact that the defendant's vehicle was found lawfully parked on the shoulder of the road, with its headlights on and its motor running. Tire tracks in the snow indicated that the vehicle had traveled in a straight line following its departure from the road. There was no sign of a collision, no evidence of property damage, and no apparent injury, other than visible intoxication. *Id.*

The Court of Appeals has noted that the accident exception in MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) is not applicable to chemical analyses of urine samples. *People v Mayhew*, 236 Mich App 112, 118 (1999). Nonetheless, the panel in *Mayhew* upheld the trial court's refusal to suppress results of a urine test that showed the presence of a controlled substance in the body of a defendant charged with felonious driving and other related offenses. After the auto accident giving rise to the charges in this case, the defendant was hospitalized and a search warrant issued for his blood test results. Although the warrant specified only the blood test results, the hospital released the results of a urine test that showed the presence of the active

ingredient in marijuana. This evidence was admitted over defendant's objection at trial. On appeal from his conviction, defendant asserted that: 1) the urine test results were inadmissible under MCL 257.625a(6)(a); MSA 9.2325(1)(6)(a), because the more specific provisions governing blood tests in MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) created an exception to the subsection (6)(a) provisions; and, 2) the search warrant was limited to blood test results, so that the urine test results were beyond its scope.

The Court of Appeals rejected the defendant's first assertion, finding no incompatibility between subsections (6)(a) and (6)(e):

> "[S]ubsection (6)(a) clearly allows into evidence chemical analyses that show the amount of alcohol or presence of a controlled substance in a driver's urine. Subsection (6)(e) says nothing whatsoever regarding urine tests and, accordingly, cannot be read as disallowing the admission into evidence of urine tests or otherwise contradicting or presenting a conflict with subsection (6)(a)." *Id.*, at 119.

The Court further rejected defendant's assertion that the search warrant for blood test results precluded admission of results of other types of medical tests. Citing *People v Perlos*, 436 Mich 305 (1990), the Court found that the defendant had no reasonable expectation of privacy with respect to the results of his urine test; accordingly, he had no standing to challenge the government's action in securing the results from the hospital. *Id.*, at 119–21.

B. Consent to Test Prior to Arrest

A defendant may voluntarily consent to administration of a blood test prior to arrest on drunk driving charges. In *People v Borchard-Ruhland*, __ Mich __ (No. 112436, July 1, 1999), the Michigan Supreme Court considered the admissibility of a blood sample taken without a warrant prior to the defendant's arrest on charges of OUIL causing serious impairment of a body function. Defendant had been taken to a hospital after the accident giving rise to the charges, where a police officer requested her to submit to blood testing. The defendant agreed to the test, but later protested the admission of the test results at her preliminary examination, asserting that she had not been advised of her rights under the "implied consent" statute, MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b). She further asserted that a prior valid arrest is mandatory before a motorist may legally consent to blood alcohol testing.

*The court left for another day the issue whether the "implied consent" statute limits the authority of police to request voluntary chemical testing where the suspect has been arrested and falls within the ambit of the statute.

The Supreme Court found that because the defendant was not under arrest at the time the blood test was taken, the "implied consent" statute did not apply. Accordingly, the officer's failure to advise her of her rights under §625a(6)(b) did not render the test results inadmissible. Furthermore, the Court held that nothing in the relevant statutory provisions limited the authority of police to request voluntary chemical testing where the defendant was not under arrest.* The validity of the defendant's consent to the testing, and the admissibility of the test results, is governed by the conventional constitutional standards against unlawful searches and seizures found in the Fourth Amendment to the U.S. Constitution and Const 1963, art 1, §11. In determining whether the defendant's consent was freely and voluntarily given, the trial court must assess the totality of the circumstances. Knowledge of the right to refuse consent is not a prerequisite to effective consent, and the prosecution need not prove that the person giving consent knew of the right to withhold consent. Knowledge of the right to refuse is but one factor to consider in determining whether consent was voluntary under the totality of the circumstances.

Although police may rarely seek a juvenile's consent to withdraw blood for chemical testing prior to taking the juvenile into custody, the following general principles should be kept in mind in such circumstances.

- **F** Taking a blood sample to determine blood-alcohol content constitutes a search under the Fourth Amendment to the United States Constitution. *Schmerber v California,* 384 US 757, 767; 86 S Ct 1826; 16 L Ed 2d 908 (1966). One exception to the general "probable cause" and warrant requirements is a search conducted pursuant to a valid consent. *Schneckloth v Bustamonte,* 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973). To determine whether consent was freely and voluntarily given rather than a product of police coercion, a court must examine the totality of the circumstances surrounding the consent, including the characteristics of the person who consented. *Id.,* at 226–27, and *People v Reed,* 393 Mich 342, 362–63 (1975).

- **F** A motorist's knowledge of the right to refuse without penalty chemical testing that is not conducted under the "implied consent" statute is but one factor to consider in evaluating the voluntariness of the consent. *People v Borchard-Ruhland, supra.* In addition, age, maturity, and educational level may be considered in determining the voluntariness of the consent to search. *United States v Mayes,* 552 F2d 729, 732–33 (CA 6, 1977), and *In re JM,* 619 A2d 497, 502 (DC App 1992) (14-year-old suspect's age and maturity "critical" to the validity of his consent to frisk of his person).

- **F** In the context of a waiver of *Miranda* rights, the Michigan Court of Appeals has emphasized the importance of the presence of a parent. In *In the Matter of Abraham,* 234 Mich App 640, 651 (1999), the Court stated the following concerning the 11-year-old defendant's waiver:

  > "We find it a matter of great significance that defendant's mother was present for, and participated in, the entire *Miranda*-waiver process. Parents normally have the duty and authority to act in furtherance of both the physical and legal needs of their minor children. This responsibility includes deciding whether the minor will undergo medical treatment, deciding what school the minor will

attend, signing contracts for or on behalf of the minor, and assisting the minor in deciding whether to waive *Miranda* rights."

However, when scrutinizing the validity of a consent to search, Michigan courts examine the totality of the circumstances surrounding the consent; Michigan courts do not utilize a "waiver of constitutional rights" analysis. *Schneckloth v Bustamonte*, 412 US 218, 238; 93 S Ct 2041; 36 L Ed 2d 854 (1973), and *People v Reed*, 393 Mich 342, 363 (1975).

F Parents must consent to non-emergency medical procedures performed on their minor children. *Zoskie v Gaines*, 271 Mich 1, 10 (1935). However, emancipation occurs by operation of law "for the purpose of consenting to routine, nonsurgical medical care or emergency medical treatment of a minor, where the minor is in the custody of a law enforcement agency and the minor's parent or guardian cannot be promptly located." MCL 722.4(2)(d); MSA 25.244(4)(2)(d).

1.13 Refusal to Comply With Search Warrant

The Fourth Amendment does not necessarily prohibit police from using pain compliance techniques to obtain dissolvable evidence pursuant to a search warrant. To determine the reasonableness of a particular seizure, the court must balance the nature and quality of the intrusion on a person's Fourth Amendment interests against the countervailing governmental interests at stake. *People v Hanna*, 223 Mich App 466, 471 (1997), citing *Graham v Connor*, 490 US 386, 396; 109 S Ct 1865; 104 L Ed 2d 443 (1989). In *Hanna*, the Court of Appeals held that it was "objectively reasonable" under the circumstances of the case for police to use "Do-Rite sticks" to subdue an uncooperative defendant long enough for a hospital employee to draw blood as provided in a search warrant. The Court found that the police had a strong, legitimate interest in executing the warrant as soon as possible, and that the laboratory technician could not safely have drawn the defendant's blood unless the defendant ceased his combative conduct. Moreover, the intrusion on the defendant's person was not severe, unnecessary, or unduly intrusive; the defendant was so combative that handcuffs and bed restraints would not have been effective to immobilize him while his blood was drawn. *Hanna, supra,* at 473. The Michigan Supreme Court denied leave to appeal in this case, its majority finding that "[t]he officers used a reasonable amount of force in light of the surrounding facts and circumstances" and that the Court of Appeals had properly applied the "objective reasonableness" test in *Graham v Connor, supra*. 459 Mich 1005 (1999).

Persons who refuse to submit to a chemical test pursuant to a valid search warrant may be charged with resisting and obstructing an officer. In *People v Davis*, 209 Mich App 580 (1995), the defendants were arrested for OUIL. After the defendants refused to take "Breathalyzer" tests, police obtained valid search warrants to procure blood samples. When the defendants refused to allow a lab technician to draw their blood pursuant to the search warrants, they were charged with resisting and obstructing an officer under MCL 750.479; MSA 28.747. The circuit court dismissed these charges, finding that

the refusal to cooperate with the lab technician did not interfere with the execution of the police officers' duties. The Court of Appeals reversed the dismissal of the charges, holding that the defendants had hindered the police officers in the execution of their duties by refusing to allow the lab technician to draw their blood. The Court found that the officers' duty to "keep the peace" included the procurement of blood samples in enforcement of valid search warrants. 209 Mich App at 586.

1.14 The Applicability of the "Exclusionary Rule" to Juvenile Proceedings

The "exclusionary rule" provides that evidence obtained in violation of the federal constitution must be excluded from state criminal trials. See *Mapp v Ohio,* 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). No Michigan case has explicitly applied the "exclusionary rule" to juvenile delinquency proceedings. See, however, *United States v Frederick Doe*, 801 F Supp 1562, 1567–68 (ED Tex 1992), which held that the "exclusionary rule" applied to federal delinquency proceedings and listed the states that have applied the rule to state delinquency proceedings.

1.15 Sample Search Warrants

The following sample search warrants are reprinted from the *OUIL Manual* (1998) published by the Prosecuting Attorneys Coordinating Council. The first sample warrant packet is for general use, and the second packet is for use following a motor vehicle accident where there is probable cause that an operator has consumed alcohol.